

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

Z.H.,[†]

Appellant.

No. 37656-3-II

UNPUBLISHED OPINION

Hunt, J. — ZH, a minor, appeals the superior court’s¹ denial of his motion to dismiss his guilty plea convictions for six counts of second-degree arson and two counts of second-degree burglary. He argues that (1) the prosecutor’s intrusion into his attorney-client relationship requires our reversal because it prejudiced the outcome of his case; and (2) the superior court erred in entering findings of fact numbers 25 and 26 and conclusions of law numbers 1 and 3-7. We affirm.

FACTS

I. Background

In December 2006, 17-year-old ZH lived with his mother, Kristine Wallace, in Lewis County.² Wallace believed that ZH had participated in a series of area arsons because she had

[†] ZH committed the crimes when he was a minor. Although he is now over 18 years old, we refer to him by his initials.

¹ We use the term “superior court” to distinguish the Thurston County visiting judge who heard ZH’s motion to dismiss from the Lewis County judge who took ZH’s guilty plea.

seen him and his adult friend, John Zylstra, scrubbing out a car in her driveway while the smell of fuel permeated her home. She asked elected Lewis County Prosecutor Michael Golden, with whom she was involved a romantic relationship, if he had heard about the arsons and told him that ZH might be involved. Golden replied that he knew about the arsons, but it is unclear from the record whether he asked Wallace any questions about ZH's involvement.³

Sergeant Alan Stull, who was investigating the arsons, learned from one of ZH's high school friends that ZH and Zylstra had burned an abandoned cabin, a bus, and a public bathroom. Stull contacted ZH at Wallace's home to verify the allegations. After Stull advised ZH of his *Miranda*⁴ rights, ZH admitted having burned a cabin, an old mill, a pump house, a bus, a bus shed, a dollhouse, and bathrooms at two community parks. Stull arrested ZH and escorted him to a juvenile detention center.

II. Procedure

On January 10, 2007, the State charged ZH with six counts of second-degree arson under RCW 9A.48.030 and two counts of second-degree burglary under RCW 9A.52.030.⁵ Wallace hired private defense attorney, Jonathan Meyer, to represent ZH.

² ZH was born on August 17, 1989.

³ According to Wallace, Golden asked her questions about the arsons and ZH's involvement. But the record before us on appeal contains no information about the general details of this conversation; nor does it mention any specific questions about ZH.

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁵ The State also arrested and charged Zylstra for the arsons. These charges, however, are not part of the instant appeal.

A. Juvenile Court Guilty Plea

The State offered ZH a plea bargain: If ZH pleaded guilty to all eight counts, the State would (1) forego a declination hearing and keep ZH in juvenile court, (2) reduce its sentence recommendation from 103-129 weeks to 65-68 weeks, and (3) recommend credit for time served. Meyer advised Wallace and ZH to refuse the State's plea offer because he believed that ZH could get a better "deal" by continuing negotiations. Meyer recommended waiting for the State "to cool down" and to present a reasonable "deal" or he would take the case to trial.

After this conversation, Wallace called Golden and expressed confusion about whether to trust Meyer's legal advice or to accept the State's plea offer. According to Wallace, Golden told her to have "faith in him" (Golden) and that he would "push the calendar" to expedite ZH's case. She understood this to mean that she should advise ZH to accept the State's plea offer because Meyer's advice to hold out for a more favorable offer was unreasonable.

Relying on advice from Wallace, his father, and his stepfather—all of whom recommended accepting the State's plea offer, ZH decided to sign the plea agreement. ZH agreed to sign the plea agreement because it allowed him to avoid adult court: ZH reasoned that the plea offer "was a good idea" because he "was so afraid of going to adult prison." Report of Proceedings (RP) (Nov. 13, 2007) at 290. Additionally, although ZH relied on advice from his parents, he repeatedly stated that the decision to sign the plea offer was his alone. On March 3, he pleaded guilty to six counts of second-degree arson (counts I-IV, VI, VII) and two counts of second-degree burglary (counts V and VIII).

B. Motion to Dismiss Under Criminal Rule 8.3(b)

Four months later, after learning that Golden and Wallace had been involved in a romantic relationship during the pendency of his case, ZH moved to dismiss the charges based on governmental misconduct. Citing Criminal Rule 8.3(b), he alleged that “Golden systematically, through his conversations with Ms. Wallace, destroyed the attorney-client relationship between [ZH] and his attorney” and that Golden “continued to use his position of power and trust with Ms. Wallace to gather information [about ZH’s case].” Clerk’s Papers (CP) at 59. A visiting judge heard the motion to dismiss and testimony from both parties.

1. Testimony

Christopher Baum, senior deputy prosecutor for Lewis County, testified that he had supervised the case against ZH’s adult accomplice, Zylstra, and had discussed the charges against Zylstra and ZH with Golden. Baum also testified that Golden did not provide information or offer his opinion about ZH’s prosecution, and that Golden played no role in ZH’s plea negotiations.

Jason Richards, deputy prosecutor and criminal division supervisor for Lewis County, similarly testified that Golden had no involvement in ZH’s case. Richards testified that when he first told Golden about ZH’s case, Golden responded that because he had a dating relationship with ZH’s mother, he (Golden) would take no part in it. And Golden “was very adamant that he wanted the case to be done ‘by the numbers.’” RP (Nov. 13, 2007) at 54.

Wallace testified that although Golden did not discuss ZH’s prosecution with her, her conversations with Golden affected the advice she gave ZH. She distrusted Meyer’s advice, felt that he was “out to get [Golden],” and relied on Golden’s assurances in advising ZH to plead

guilty. Wallace further testified that, in advising ZH to accept the plea agreement, she had also relied on advice from her stepfather: “[M]y stepdad said it was a fair deal from his perspective, so I told [ZH] [,] ‘You know what, we trust our grandpa Bill. I think that’s the best deal. We need to take it.’” RP (Nov. 13, 2007) at 139.

ZH testified that: (1) but for his mother’s advice, he would have listened to his attorney; (2) although he put the most weight on his mother’s advice, his father and stepfather had also recommended accepting the plea offer; and (3) in the end, the decision to accept the State’s plea offer was his (ZH’s) alone. When asked whether he thought this was “a good plea agreement,” ZH answered, “Yes, I do think it was a good idea because, umm, I was so afraid of going to adult prison.” RP (Nov. 13, 2007) at 290. ZH then equivocated, stating that if he had followed Meyer’s advice “things possibly could have been more rightfully handled.” RP (Nov. 13, 2007) at 290. ZH did not elaborate, however, about how the case “possibly could have been more rightfully handled” or specify in what manner he might have obtained a better outcome. Moreover, he did not ask the superior court to allow him to withdraw his guilty plea. Thereafter, ZH repeatedly acknowledged that it was *his* decision to accept the plea offer, stating that he “was expecting to plead guilty” well before signing his statement on plea of guilty because he had “already made that decision.” RP (Nov. 13, 2007) at 297.

Golden testified that he first heard about ZH’s arrest at the prosecutor’s office after reading Zylstra’s police report, which mentioned ZH by name. Golden testified that when he saw ZH’s name, he told Richards, “I’m dating this guy’s mother,” RP (Nov. 13, 2007) at 355, “This case is handled without me. Handle it as every other case. I am not going to interfere.” RP

(Nov. 13, 2007) at 356-57. Golden also testified that between ZH's arrest and acceptance of the plea agreement, he (Golden) did not discuss ZH's case with Wallace. RP (11/13/07) at 368. Golden also (1) denied telling Wallace to have faith in him and that he would "push the calendar" for ZH's case; and (2) testified that Wallace never expressed confusion about whether to accept Meyer's advice.

2. Denial of Motion

Concluding that Golden's involvement in ZH's case did not violate the attorney-client relationship or constitute governmental misconduct under CrR 8.3(b), the superior court denied ZH's motion to dismiss. The superior court also found that (1) ZH failed to demonstrate that Golden had conveyed information from Wallace to the Lewis County Prosecutor's Office; (2) when Wallace spoke to Golden about ZH's case, he (Golden) "did no more than express comfort to her in having to face that dilemma," CP at 30; and (3) Golden's involvement with Wallace did not affect ZH's prosecution.

The superior court further found that ZH had obtained a favorable result by agreeing to the State's plea offer because ZH's attorney (1) prevented the State from seeking a juvenile declination hearing and transferring ZH to adult court, (2) persuaded the State to reduce its sentence recommendation from 103-129 weeks to 65-68 weeks, and (3) obtained the State's agreement to recommend credit for the time ZH had already served. Based on these facts, the superior court determined that (1) "there was no inappropriate involvement by Prosecuting Attorney Michael Golden in the prosecution of this case, and therefore no governmental misconduct"; (2) "Golden did not influence, nor attempt to influence, Kristine Wallace in the

advice she gave her son regarding whether to accept the state's plea offer in this case"; (3) "no confidential communication between Jonathan Meyer and [ZH] was communicated to Prosecuting Attorney Michael Golden during [ZH's] prosecution"; (4) the plea agreement "was not the result of overreaching by the State but rather was the result of effective plea negotiations by [Meyer"; (5) "[ZH] was not prejudiced by the manner in which that plea agreement was reached"; and (6) "[ZH] entered his pleas of guilty in this case with a full understanding of his rights and did so freely and voluntarily, and that [ZH] was not prejudiced by the circumstances in which he made his choice to plead guilty."⁶ CP at 31-32.

ZH appeals.

ANALYSIS

ZH argues that the superior court abused its discretion in denying his motion to dismiss under CrR 8.3(b) because it incorrectly concluded that Golden had done nothing inappropriate to affect his (ZH's) attorney-client relationship with Meyer and that ZH had suffered no prejudice.⁷ More specifically, he asserts that the trial court erred in entering its associated findings of fact numbers 25 and 26 and conclusions of law numbers 1 and 3-7. We disagree.

I. Standard of Review

We review a trial court's denial of a motion to dismiss under CrR 8.3(b) for an abuse of

⁶ The superior court's findings of fact numbers 25 and 26 and conclusions of law numbers 1 and 3-7 reflect these determinations.

⁷ ZH never moved to vacate his guilty plea below; nor does he seek such relief on appeal. When we asked at oral argument whether we should remand and order the superior court to allow ZH to withdraw his guilty plea, his counsel clearly rejected this idea and expressed that withdrawal of the plea is not what ZH is seeking, only dismissal.

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discretion. *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868 (citing *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)), *review denied*, 141 Wn.2d 1014 (2000). An abuse of

discretion occurs when the trial court's order or decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ryan v. State*, 112 Wn. App. 896, 899, 51 P.3d 175 (2002) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A trial court's decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *Ryan*, 112 Wn. App. at 899-900 (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). A trial court's decision is based on untenable grounds if the record does not support the factual findings; it is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard. *Ryan*, 112 Wn. App. at 899-900 (citing *Littlefield*, 133 Wn.2d at 47).

II. Motion to Dismiss, CrR 8.3 (b)

CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct *when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.*

(emphasis added). This rule requires a defendant seeking dismissal to show both (1) that the government entity engaged in arbitrary action or misconduct and (2) that this misconduct "materially affected" the outcome of the case. The superior court found that ZH met neither prerequisite.

A. No Governmental Misconduct

ZH relies primarily on *State v. Cory* and *State v. Garza* to support his argument that the

trial court abused its discretion in failing to grant his motion to dismiss. *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963); *Garza*, 99 Wn. App. 291. Although these cases aid our analysis of the issues, they fail to support ZH's argument.

In *Cory*, the Washington State Supreme Court analyzed government intrusion into the attorney-client relationship. Cory met with his attorney to discuss his case in a private jail room, where the sheriff had secretly installed a microphone. *Cory*, 62 Wn.2d at 372. When Cory discovered this, he moved for a new trial, alleging that the sheriff's act of eavesdropping to gain confidential case information had deprived him of effective assistance of counsel. See *Id.* Although the trial court denied Cory's motion, the Supreme Court reversed this ruling, set aside the judgment and sentence, and dismissed the charges. *Cory*, 62 Wn.2d at 378. The Supreme Court reasoned that because the sheriff had unlawfully obtained confidential information about Cory's case and defense trial strategy that would assist the prosecution, "There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this." *Cory*, 62 Wn.2d at 377.

Unlike the facts in *Cory*, the record here supports the superior court's findings that Golden had no direct contact with ZH, Meyer, or any defense case materials and that Golden did not participate in the prosecution of ZH's case or discuss the case with Wallace.⁸ Furthermore, ZH's own testimony demonstrated that he knowingly and voluntarily accepted the State's plea offer, that he had rejected Meyer's recommendation to wait based on the advice of several people

⁸ Consistent with the record, at oral argument in our court, ZH acknowledged that Golden did not obtain from his (ZH's) mother any confidential information about his (ZH's) case.

(primarily his mother),⁹ and that the ultimate decision to accept the State’s favorable plea offer was his (ZH’s) alone. Thus, we affirm the superior court’s conclusion that ZH failed to establish governmental misconduct entitling him to dismissal under CrR 8.3(b).

B. No Prejudice

Next, we turn to our Supreme Court’s holding in *Garza*,¹⁰ which establishes that to prevail on a CrR 8.3(b) motion to dismiss, a defendant must show how the alleged prejudice “materially affected his or her rights to a fair trial.” *Garza*, 99 Wn. App. at 295 (citing *City of Seattle v. Orwick*, 133 Wn.2d 823, 830, 784 P.2d 161 (1989)). Because ZH failed to show how Golden’s conduct “materially affected” his right to a fair trial, we also affirm the superior court’s conclusion that ZH failed to establish prejudice and, therefore, he was not entitled to dismissal under CrR 8.3(b).

Even were we to assume, in the absence of support in the record, that Golden interfered with ZH’s attorney-client relationship with Meyer, ZH failed to show that such alleged interference actually prejudiced his case. ZH asserts that Golden prejudiced his case because he (ZH) accepted the State’s plea offer against Meyer’s advice. Although below ZH asserted

⁹ We further note that ZH never testified that Golden spoke with ZH or urged him to accept the plea offer.

¹⁰ In Division Three’s *Garza* decision, jail officers had searched inmates’ cells and seized inmates’ personal property during a raid of the facility. *Garza*, 99 Wn. App. at 293. *Garza*, one of the inmates, testified that officers had seized and read his legal materials. *Id.* at 293-94. *Garza* moved to dismiss his conviction under CrR 8.3(b), alleging that the officers’ review of his confidential legal materials denied him the right to counsel. *Id.* at 294. As here, *Garza* appealed the trial court’s denial of his CrR 8.3(b) motion to dismiss. The Supreme Court remanded to the trial court for further fact-finding on whether the government’s actions had prejudiced *Garza*. *Id.* at 302.

generally that “things possibly could have been more rightfully handled,” RP (Nov. 13, 2007) at 290, he has failed to identify—both in his briefing and in response to our questions at oral argument—any specific prejudice caused by Golden’s alleged interference or how his situation would have been more beneficial had he followed Meyer’s advice.

On the contrary, the record shows that ZH suffered no prejudice. As the superior court found, ZH obtained a favorable result by agreeing to the State’s plea offer. The plea bargain: (1) prevented ZH’s prosecution as an adult, which would have exposed him to far harsher treatment and a much longer sentence;¹¹ (2) reduced the State’s recommended sentence from 103-129 weeks to 65-68 weeks; (3) provided credit for time ZH had already served on electronic home monitoring, including the time he spent waiting to testify in Zylstra’s trial; and (4) insulated him from additional charges arising from other cases that the State agreed not to pursue. Moreover, when the superior court asked ZH whether he thought this was “a good plea agreement,” he answered, “Yes, I do think it was a good idea because, umm, I was so afraid of going to adult prison.” RP (Nov. 13, 2007) at 290. Because ZH failed to demonstrate any prejudice caused by Golden’s alleged misconduct, he could not prevail under CrR 8.3(b), which allows dismissal based on governmental misconduct only when “there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” CrR 8.3(b).

¹¹ Significantly, because ZH was 17 years old while his case was pending, the State could have requested a declination hearing to move his case to adult court and, thus, subject him to correspondingly harsher adult penalties for his crimes. The crimes for which ZH was charged—second-degree arson and second degree burglary—are class B felony offenses, RCW 9A.48.030; RCW 9A.52.030, which for adults have statutory maximum sentences of (1) ten years confinement in a state correctional institution, (2) \$20,000 in fines, or (3) both. RCW 9A.20.021(1)(b).

Accordingly, we hold that the superior court did not abuse its discretion in denying ZH's motion.¹² We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Quinn-Brintnall, J.

¹² Although we hold that ZH failed to show governmental misconduct or prejudice under *Cory* and *Garza*, respectively, we do not condone Golden's "reassurances" to Wallace about ZH's case and his communications with her during the pendency of ZH's prosecution. We further note that this conduct appears to violate both the letter and the spirit of the Rules of Professional Conduct, especially the "Special Responsibilities of a Prosecutor" under Rule 3.8, comment 1, which notes: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."